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IN THE

Supreme Court of the United States

GREGORY LOUIS CLARKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether United States Sentencing Guidelines Manual section 2T1.1 permits a defendant to offset the government's calculation of its "tax loss" with legitimate but previously unclaimed tax deductions or benefits?

PARTIES AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. Petitioner Gregory Louis Clarke is not a corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reprinted at 562 F.3d 1158 (11th Cir. 2009) and is reproduced in the Appendix to this petition ("Pet. App.") at page 1a. The District Court for the Northern District of Alabama did not issue a written opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 2009. A timely petition for rehearing was denied on May 27, 2009. Pet. App. 26a. On July 8, 2009, this Court granted Mr. Clarke's Motion for an Extension of Time Within Which to File his petition for a writ of certiorari to and including September 24, 2009. On September 5, 2009, this Court granted Mr. Clarke an additional extension of time to and including Saturday, October 24, 2009. As confirmed with the Clerk's office, pursuant to Supreme Court Rule 30.1, the time for filing is the following Monday, October 26, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

This petition involves 26 U.S.C. § 7206, which states, in pertinent part, that "[a]ny person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than

$100,000 . . . or imprisoned not more than 3 years, or both, together with the costs of prosecution." The petition also involves Section 2T1.1 of the United States Sentencing Guidelines, which states in pertinent part, as follows:

> § 2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents
>
> (a) Base Offense Level:
>
> (1) Level from § 2T4.1 (Tax Table) corresponding to the tax loss; or
>
> (2) 6, if there is no tax loss.
>
> (b) Specific Offense Characteristics
>
> (1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
>
> (2) If the offense involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
>
> (c) Special Instructions
>
> For the purposes of this guideline—
>
> (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).
>
> . . . .

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made."

. . . .

Section 2T1.1 is set forth in full at Pet. App. 27a-35a.

STATEMENT OF THE CASE

There is an acknowledged and longstanding split among the circuits over the meaning of the term "tax loss" for purposes of determining the recommended sentence for a criminal violation of the tax code under the United States Sentencing Guidelines. As a result, the length of sentence for an individual like Mr. Clarke, who has been convicted of a tax-related offense, differs substantially depending on the jurisdiction in which the offense is committed.

Under United States Sentencing Guidelines section 2T1.1, the recommended sentence for an individual convicted of filing a false tax return is determined by the amount of "tax loss" resulting from the offense. U.S.S.G. § 2T1.1(a)(1). The Guidelines direct courts to determine the tax loss amount by calculating 28% of the defendant's unreported gross income, "unless a more accurate determination . . . can be made." U.S.S.G. § 2T1.1(c)(1), Note (A).

There has been persistent conflict among the circuits as to the meaning of "tax loss." In particular, courts disagree as to whether, for sentencing

purposes, the "tax loss" calculation can include consideration of legitimate tax benefits which the defendant is entitled to, but which he did not claim in connection with his fraudulent return. One circuit has held that legitimate but previously unclaimed tax benefits can be accounted for in the calculation of tax loss. See *infra* pp. 10-11, 14-18. Four other circuits have addressed the issue, and at least three have suggested (without expressly deciding the question) that they would allow a defendant to offset the government's calculation of tax loss with legitimate but previously unclaimed deductions if the defendant presents sufficient evidence of entitlement to such deductions. See *infra* pp. 11-13. Four circuits, including the court below, have held that legitimate but previously unclaimed tax benefits are excluded from the calculation of tax loss. See *infra* pp. 18-20.

BACKGROUND

Petitioner Gregory Louis Clarke was convicted of filing false tax returns by understating his income. Pet. App. 2a-3a, 6a. Rather than calculate Mr. Clarke's tax loss by using the presumptive 28% rate, the government proposed, and the District Court agreed, to "make a more accurate determination" of the government's tax loss. *Id.* at 7a; Supp. App. 10a. The District Court, however, refused to include in that "more accurate determination" Mr. Clarke's desired change in marital filing status, which, if included, would have resulted in reducing the base offense level for Mr. Clarke's sentence. See Pet. App. 6a-7a, 9a-10a.

The Eleventh Circuit affirmed the sentence. Pet. App. 14a. It acknowledged the Second Circuit's "holding that [a] district court erred in refusing to consider potential unclaimed deductions in

sentencing analysis" but chose instead to "join the majority of the circuits that have addressed this issue and hold that 'tax loss' under U.S.S.G. § 2T1.1(c)(1) is the amount of loss the defendant intends to create when he falsifies his tax return and must therefore be calculated based upon the fraudulent return." See *id.* at 10a-11a ("Although we have not decided the issue of whether a defendant's unclaimed deductions or losses may be taken into account in determining tax loss for purposes of § 2T1.1(c)(1), several other circuits have taken the government's position and have held that the 'tax loss' is the amount of loss the defendant intends to bring about, not the amount of loss to the government that actually results . . . .").

A. Statutory Background

Section 2T1.1 of the United States Sentencing Guidelines ("U.S.S.G." or "the Guidelines") provides suggested sentencing guidelines for various tax crimes. For an individual convicted of filing a false tax return, the base offense level is determined by the amount of "tax loss" associated with the offense. U.S.S.G. § 2T1.1(a).

Prior to 1993, section 2T1.1 as then drafted precluded consideration of legitimate but previously unclaimed tax benefits in the calculation of tax loss. It defined tax loss as "*the greater of* (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the 'tax loss' defined in § 2T1.3." U.S.S.G. § 2T1.1 (1991) (emphasis added). Section 2T1.3, in turn, defined "tax loss" as "28% of the amount by which the greater of gross income and taxable income was understated." U.S.S.G. § 2T1.3 (1991). Setting as minimum payment the second calculation above—"28% of the amount by which the greater of gross income and taxable income was understated"—ensured that in no case would a

defendant's legitimate but unclaimed deductions be able to reduce the calculation of tax loss. *Id.* The commentary to this earlier version of section 2T1.1 confirmed that the 28% tax rate "may be easier to determine, and should make irrelevant the issue of whether the taxpayer was entitled to offsetting adjustments that he failed to claim." U.S.S.G. § 2T1.1 n.4.

A number of courts construed this earlier version of section 2T1.1 to preclude any consideration of defendants' legitimate but previously unclaimed deductions. See, *e.g.*, *United States* v. *Valentino*, 19 F.3d 463, 465 (9th Cir. 1994) (interpreting the pre-1993 guidelines and noting that tax loss is "based on the nature and magnitude of the false statements . . . [and that it is] irrelevant . . . whether the taxpayer was entitled to offsetting adjustments that he failed to claim") (emphases omitted); *United States* v. *Harvey*, 996 F.2d 919, 920-21 (7th Cir. 1993) (Easterbrook, J.) (same). Some, however, held otherwise. *United States* v. *Schmidt*, 935 F.2d 1440, 1451 (4th Cir. 1991) (remanding for a determination of the actual tax loss suffered by the government taking into account defendant's legitimate deductions).

The United States Sentencing Commission ("the Commission") made three significant changes to section 2T1.1 that became effective in 1993:

1. To "eliminate[] the anomaly of using actual tax loss in some cases and an amount that differs from actual tax loss in others," the Commission redefined the term "tax loss." U.S.S.G. § 2T1.1 (1993), Commentary, Background. Under the new Guidelines, tax loss is equal to "the total amount of loss that was the object of the offense (i.e., the loss

that would have resulted had the offense been successfully completed)." *Id.* § 2T1.1(c)(1).

2. The Commission further defined "tax loss" by clarifying that the "amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)," shall be equal to 28% of the defendant's unreported gross income, unless a "*more accurate determination of the tax loss can be made.*" *Id.* § 2T1.1(c)(1), Note (A) (emphasis added).

3. The Commission deleted footnote 4 of the commentary to section 2T1.1 that had provided that previously unclaimed tax benefits could not offset the calculation of tax loss. Compare U.S.S.G. § 2T1.1 (1993) with *id.* § 2T1.1 n.4 (1991).

B. Mr. Clarke's Sentence

Mr. Clarke has served as the pastor of New Hope Baptist Church ("the church") and Superintendant of New Hope Christian School, in Birmingham, Alabama, since 1986. Pet. App. 2a. In 2001, Mr. Clarke also served as interim manager of the New Hope Federal Credit Union ("the credit union"). *Id.* The church compensated Mr. Clarke for the services that he provided in each of those capacities. *Id.* In addition, Mr. Clarke received a $36,000 per year non-taxable minister's housing allowance, which was deposited into a bank account held by the church. *Id.*

Mr. Clarke reported this income on his annual federal tax returns, including the returns for the tax years 2000, 2001 and 2002. See Pet. App. 2a-5a. Professional tax advisors prepared each of those tax returns based upon Mr. Clarke's forms W-2s and 1099s, without verifying Mr. Clarke's income. See *id.* at 3a. Mr. Clarke was never advised that he was required to report income not reflected on his forms

W-2s and 1099s. See *id.* On each of those returns, Mr. Clarke's filing status was "married, filing separately." See *id.* at 9a.

Prosecutors charged that Mr. Clarke received additional income that he did not declare in his tax returns in 2000, 2001, and 2002. Pet. App. 2a-3a. Specifically, the government alleged that Mr. Clarke understated his income by $11,205.94 in 2000, by $28,715.15 in 2001, and by $70,450.01 in 2002. *Id.* at 2a. Mr. Clarke was indicted for three counts of willfully filing false tax returns in violation of 26 U.S.C. 7206(1). *Id.* at 2a-3a. Following a jury trial in the United States District Court for the Northern District of Alabama, Mr. Clarke was convicted of all three counts. *Id.* at 6a.

Mr. Clarke was sentenced to imprisonment of twenty-one months under section 2T1.1 based on a tax loss figure of $35,684, a resulting base offense level of 14, and a 2-level enhancement. Pet. App. 6a-7a. Rather than determine Mr. Clarke's base offense level based on 28% of his total unreported income, the District Court chose, pursuant to section 2T1.1(c)(1), Note (A), to make a "more accurate determination of the tax loss" based on calculations in Mr. Clarke's pre-sentence investigation report ("PSR") performed by the Internal Revenue Service ("IRS"). Pet. App. 7a; Supp. App. 10a. Specifically, the IRS's "more accurate determination" was based on a calculation of the precise taxes owed in 2000, 2001, 2002, based on the amount of unreported income in each year. Supp. App. 9a-10a. Using the IRS's calculations, the PSR recommended a base offense level of 14, based on a calculated tax loss of $35,684. *Id.* at 10a.

Despite its application of the "more accurate determination" standard, the District Court refused to give Mr. Clarke the benefit of a "married, filing

jointly" filing status, which, if used, would have reduced his base offense level and resulted in a shorter sentence. Pet. App. 6a-7a. The District Court refused to permit Mr. Clarke to change his filing status even though there was no dispute that Mr. Clarke would have been entitled in each year to file a return as "married, filing jointly." *Id.*

Before sentencing, Mr. Clarke objected to the tax loss figure included in the PSR. See Pet. App. 6a. Specifically, he argued that tax loss should be calculated as though he had legally amended his tax return to reflect a filing status of "married, filing jointly." *Id.* at 6a. He renewed this objection at the sentencing hearing, where he offered testimony by a private accountant who explained that, if such a filing status had been applied, the amount of tax loss would have been reduced from $35,684 to $28,186, resulting in a base offense level of 12 rather than 14. See *id.* at 6a, 9a-10a.

The District Court overruled Mr. Clarke's objection, adopted the PSR, and issued a twenty-one month sentence. *Id.* at 7a.

On appeal, Mr. Clarke argued, among other points, that the District Court erred in refusing to consider Mr. Clarke's option to change his marital filing status. Pet. App. 9a-10a. In particular, Mr. Clarke argued that he was entitled to use a "married, filing jointly" tax status in each year at issue, use of which would have constituted a "more accurate determination" of the government's tax loss and resulted in a reduction of his base offense level and sentence. *Id.*

The Eleventh Circuit rejected Mr. Clarke's argument. Pet. App. 11a, 14a. Because it had not before decided "whether a defendant's unclaimed

deductions or losses may be taken into account in determining tax loss for purposes of § 2T1.1(c)(1)," the Court looked to cases from "several other circuits." *Id.* at 10a. It recognized that Mr. Clarke's position was supported by the Second Circuit's interpretation of section 2T1.1. *Id.* at 11a. However, it adopted the contrary position, citing authority from the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. *Id.* at 10a-11a.

REASONS FOR GRANTING THE PETITION

A. There Is A Longstanding and Acknowledged Circuit Split on the Question Presented.

Since at least 2002, there has been a clear circuit split over whether a defendant's unclaimed deductions or other tax benefits may be taken into account in making a more accurate determination of tax loss for purposes of section 2T1.1(c)(1). This split has been expressly acknowledged by the Eleventh Circuit's opinion below, opinions of other circuits, and scholarly commentators. See Pet. App. 10a-11a; see also, *e.g.*, *United States* v. *Bennett*, No. 08-1849, 2009 WL 1941985, at *3 n.4 (3d Cir. Jul. 8, 2009) (unpub.) (noting that the "majority of the courts of appeals" do not require consideration of previously unclaimed tax benefits in the calculation of tax loss); *United States* v. *Blevins*, 542 F.3d 1200, 1202 (8th Cir. 2008) (noting that the "apparent conflict" over the proper interpretation of section 2T1.1 "developed after § 2T1.1 was amended in 1993"); *United States* v. *Delfino*, 510 F.3d 468, 473 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 41 (2008) ("[t]he three courts of appeals which have considered th[e] issue have split").

The Second Circuit has held since at least 2002 that section 2T1.1, by permitting courts to make a "more accurate determination" of a defendant's tax loss, expressly allows a sentencing court to consider legitimate but previously unclaimed tax benefits in calculating tax loss. See *United States* v. *Gordon*, 291 F.3d 181, 188 (2d Cir. 2002); *United States* v. *Martinez-Rios*, 143 F.3d 662, 670-71 (2d Cir. 1998). Four circuits, now including the Eleventh Circuit, squarely disagree with the Second Circuit. See *Delfino*, 510 F.3d at 473; *United States* v. *Phelps*, 478 F.3d 680, 682 (5th Cir. 2007); *United States* v. *Chavin*, 316 F.3d 666, 677-79 (7th Cir. 2002).

The circuit split on this issue has also been the subject of scholarly commentary. See Timothy J. Coley, *Disputed Deductions: Delfino and the Fourth Circuit's Prudent Adoption of the Restrictive Approach to Tax Evasion Sentencing*, 87 N.C. L. REV. 234, 236, 244 n.74 (2008); Michael J. Gulden, *Tax Loss Calculation Under United States Sentencing Guidelines Section 2T.1.1: Should Courts Account for Legitimate But Unclaimed Deductions When Calculating a Defendant's Sentence?*, 34 SW. U. L. REV. 527, 538 (2005).

B. The Split Is Likely Wider Even Than Has Been Acknowledged

Other circuits have addressed the question of whether a defendant may offset his tax loss amount with legitimate but previously unclaimed tax benefits but have not answered it. See *Blevins*, 542 F.3d 1200; *United States* v. *Roudakov*, 239 Fed. App'x. 776 (3d Cir. 2007); *United States* v. *Bishop*, 291 F.3d 1100 (9th Cir. 2002); *United States* v. *Sullivan*, 255 F.3d 1256 (10th Cir. 2001). In at least three of these circuits, however, it appears that a defendant who, like Mr. Clarke, could clearly prove an entitlement to

an unclaimed but legitimate tax benefit would be afforded that benefit in the accounting of the government's tax loss.

The Third and Ninth Circuits have not permitted defendants to offset the tax loss calculation with previously unclaimed tax benefits, not because the Guidelines forbid such accounting, but because the defendants did not, in fact, prove that they were actually entitled to any previously unclaimed tax benefits. See *Bishop*, 291 F.3d at 1115-16 (defendant not entitled to offset tax loss by claiming previously unclaimed deductions because he "did not offer such information at the time of sentencing" and any trial court error in not permitting defendant to change his marital status would have been harmless); *Roudakov*, 239 Fed. App'x. at 778 (trial court's calculation of tax loss, which did not permit offset for deductions, "was reasonable based on the available facts and lack of evidence"). These decisions suggest that had the defendants been able to provide sufficient facts to support the deduction, the courts would have required accounting for them.

While the Eighth Circuit has avoided any categorical rejection of deductions in all circumstances, it imposes a requirement that any claimed offset must be related to the fraud. In *Blevins*, the Eighth Circuit refused to consider unclaimed deductions because they were not "tax consequence[s] of the [defendant's] fraud" on the government. 542 F.3d at 1203. Given the Eighth Circuit's apparent test, Mr. Clarke's legitimate deduction might not have been considered had his case arose there, in contrast to the Third and Ninth Circuits as described above.

The Tenth Circuit initially stated in dicta that the calculation of tax loss may not account for previously

unclaimed tax benefits. See *United States* v. *Spencer*, 178 F.3d 1356, 1386 (10th Cir. 1999) ("question[ing]" the reasoning of the Second Circuit and noting "[w]e do not interpret this provision as giving taxpayers a second opportunity to claim deductions after having been convicted of tax fraud"). Two years after *Spencer*, however, the Tenth Circuit revisited the issue in *Sullivan*, 255 F.3d 1256. There, the defendant requested that the court offset the tax loss calculation with certain deductions to which he claimed he was entitled, and the court did not hold, as a matter of law, that he was not entitled to do so. *Id.* at 1263, 1264. Indeed, the government appears to have conceded in *Sullivan* that, if the defendant had established he was actually entitled to the previously unclaimed tax benefits to which he claimed entitlement, those benefits should be accounted for in the "more accurate determination" of the tax loss. See *id.* at 1264. However, because the defendant had destroyed his records, the Tenth Circuit affirmed the District Court's tax loss calculation (which did not give the defendant the benefit of deductions) because the trial court lacked sufficient evidence to "determine a more accurate tax loss figure." *Id.*

Given the age of these cases, it is plain that the split is entrenched, wide, and persistent. This Court twice has denied petitions for a writ of certiorari on the question presented by this petition. See *Delfino* v. *United States*, 129 S. Ct. 41 (2008); *Phelps* v. *United States*, 128 S. Ct. 436 (2007). It is equally plain that the Sentencing Commission has not addressed, or even suggested that it will address, this persistent conflict. Because the definition of "tax loss" affects the length of sentences in tax cases, and because the split has persisted for nearly a decade without Commission action, this Court should resolve

the disagreement among the federal courts regarding the proper interpretation of section 2T1.1.

C. The Second Circuit Correctly Interpreted Section 2T1.1 to Permit Defendants to Offset the Calculation of Tax Loss with Legitimate but Previously Unclaimed Tax Benefits

The Second Circuit first addressed the topic in 1998, in *United States* v. *Martinez-Rios*, where it observed that the original version of the "tax loss" provision was a "rough-and-ready calculation [that] applies the highest marginal rate to the amount of concealed income, disregarding deductions that would have been available had the taxpayer filed an honest return." 143 F.3d at 671 (Newman, J.) (quoting *Harvey*, 996 F.2d at 920). The *Martinez-Rios* court then noted that the 1993 version of the Guidelines deleted the provisions which "calle[d] for a calculation based on gross income and does not entitle . . . credit for . . . deductions," and added the key additional clause that permits a defendant to establish "a more accurate determination" of the government's tax loss. *Id.* (emphases omitted). The Second Circuit concluded that under the new version, "the sentencing court need not base its tax loss calculation on gross unreported income if it can make 'a more accurate determination' of the intended loss and that determination of the tax loss involves giving the defendant the benefit of legitimate but unclaimed deductions." *Id.* (quoting U.S.S.G. § 2T1.1(c)(1), Note (A)).

More recently, in *Gordon*, the Second Circuit confirmed the interpretation of the amended section 2T1.1 stated as dicta in *Martinez-Rios*. 291 F.3d at 187. The Court adopted its prior reasoning, noting that "[a]dhering to *Martinez-Rios's* suggestion, this

Court finds that the district court erred when it refused to consider any potential unclaimed deductions in its sentencing analysis." *Id.*

In *Martinez-Rios* and *Gordon*, the Second Circuit observed that the 1993 amendments to section 2T1.1 were designed to promote uniformity in sentencing by defining "tax loss" as the "actual loss" suffered by the government as a result of the defendant's fraudulent tax return. This interpretation of section 2T1.1 follows from the plain meaning of both the definition of "tax loss" and the accompanying commentary.

By defining "tax loss" as equal to "the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)," the Guidelines contemplate accounting for money in which the government has a property interest. See U.S.S.G. § 2T1.1(c)(1). Without such an interest, there can be no "loss," for it is impossible to lose what was never owned or owed. Properly read, the definition of "tax loss" in section 2T1.1 requires two separate steps: (1) determine how much the taxpayer owed the government, and (2) offset that amount by the amount (if any) that was paid, to determine the total that the government would have lost had the offense been successfully completed.

The Second Circuit's interpretation of the definition of "tax loss" also accords with and gives proper weight to the commentary to the Guidelines. See *Stinson* v. *United States*, 508 U.S. 36, 44 (1993) ("[C]ommentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice.") For example, the "Background" statement that accompanies section 2T1.1 makes explicit that the phrase "the object of

the offense" refers to the government's *actual loss* – and not the defendant's *intended loss*, noting:

> [t]his guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

U.S.S.G. § 2T1.1, Commentary, Background. Furthermore, as described by the Second Circuit in *Martinez-Rios*, the pre-1993 Guidelines provided that tax loss be calculated using an "alternative minimum standard"—setting tax loss at a minimum of "28% of unreported gross income"—thereby necessarily excluding consideration of "offsetting adjustments." 143 F.3d at 671. When section 2T1.1 was amended, the Commission deleted the requirement that the "alternative minimum standard" be used. The Commission also deleted footnote 4, which had prohibited any consideration of offsetting deductions or benefits. In addition, the Commission added new commentary explaining that, under the amended provision, the 28% presumptive rate need not be used if a "more accurate determination" of the defendant's tax liability can be determined. U.S.S.G. § 2T1.1(c)(1), Note (A). These amendments thus reflect the Commission's intention that "tax loss" be calculated according to an objective and uniform standard that accurately measures the government's tax loss and thus necessarily must consider a defendant's legitimate but previously unclaimed tax benefits in calculating that loss.

Indeed, the Guidelines do not allow sentencing courts to "skip over" important considerations that weigh in favor of the defendant, while basing sentencing calculations on those considerations that do not. Instead, they encourage sentencing courts to undertake the exercise of measuring accurate loss by all available methods. Application Note 1 to the amended section 2T1.1 provides that

> [i]n determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

U.S.S.G. § 2T1.1, Commentary, App. Note 1.

The interpretation of "tax loss" to mean "actual loss" finds support elsewhere in the Guidelines as well. In the similar context of fraud involving government benefits, the Guidelines provide that "[i]n a case involving government benefits (*e.g.*, grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $ 150, loss is $ 50." U.S.S.G. § 2B1.1, Commentary, App. Note 3(F)(ii). Thus, in cases involving misappropriation of government benefits, the sentence is based in part on the amount of loss to the

government, taking into account the defendant's legitimate entitlement to a public benefit. *Id.* § 2B1.1(b)(1). The same principle underlies the current guidelines applicable to tax loss.

Accordingly, the Second Circuit properly interpreted section 2T1.1 by holding that the calculation of tax loss may be offset by a defendant's legitimate but previously unclaimed tax benefits.

D. The Fourth, Fifth, and Seventh Circuits Have Adopted an Incorrect Interpretation of Section 2T1.1

On the other side of the split, the Seventh Circuit's opinion in *Chavin* offers the most comprehensive set of reasons for a contrary interpretation of section 2T1.1. The reasoning of the Courts of Appeals that refuse to permit legitimate but unclaimed deductions to be considered offsets to the Government's tax loss calculation relies upon redefining "loss" to mean "attempted loss" and exaggerated concerns about judicial efficiency.

In *Chavin*, the Seventh Circuit concluded that the tax loss referred to in section 2T1.1 is the "attempted or intended loss, rather than the actual loss to the government." 316 F.3d at 677. In its view, the drafters of the amended section 2T1.1 were not concerned with the government's actual tax loss, but only with the amount of tax that the defendant subjectively intended to evade. *Id.* The Court based this reading on the phrase in section 2T1.1 defining tax loss as the "object of the offense." *Id.*

In construing section 2T1.1, the Court failed to read the phrase "object of the offense" in conjunction with the parenthetical phrase that follows: "i.e., the loss that would have resulted had the offense been successfully completed." See U.S.S.G. § 2T1.1(c)(1).

In emphasizing the "result" of the offense, that parenthetical phrase indicates that tax loss should be understood as referring to actual loss to the government. As described above, the government cannot "lose" what it was never entitled to collect.

The *Chavin* court also reasoned that the 1993 addition of the provision allowing for a "more accurate determination of the tax loss" was only meant to permit application of a different tax *rate* (*i.e.*, a rate other than the default 28%) in the tax loss calculation. *Chavin*, 316 F.3d at 678-79. If this is what the drafters meant, however, they could have used the phrase "more accurate determination of the tax *rate*." Instead, however, they used the term "tax loss," a broader term that encompasses the entirety of the tax liability on the unreported income. Similarly, the notes and commentary to the amended version of section 2T1.1 refer to alternative calculations of "tax *loss*," rather than to alternative tax *rates*. See U.S.S.G. § 2T1.1, Commentary; *id.* § 2T1.1(c)(1), Notes (A)-(D) (emphasis added).

The *Chavin* opinion and others also assert that consideration of unclaimed deductions and adjustments would place an excessive burden on the sentencing court and/or the government. See *Chavin*, 316 F.3d at 678; *Delfino*, 510 F.3d at 473. In the words of the Seventh Circuit, allowing for such deductions and adjustments would lead to "subjectivity" in the calculation and require the court to "recreate a 'perfect' tax return, taking into account all the legitimate unclaimed deductions, which would undoubtedly engender a great deal of dispute between the parties over which deductions were legitimate and which were not." *Chavin*, 316 F.3d at 678. Similarly, the Fourth Circuit in *Delfino* stated that the sentencing court "would be forced to

speculate as to what deductions [the defendant] would have claimed and what deductions would have been allowed." 510 F.3d at 473.

This reasoning ignores the plain language of section 2T1.1, which requires courts to make a "more accurate determination" of tax loss where possible. U.S.S.G. § 2T1.1(c)(1), Note (A). Moreover, and in any event, the question is not whether the court must, on its own initiative and through its own efforts, identify and apply potentially available deductions and adjustments. Rather, the question is whether the defendant may be permitted to do so.

Furthermore, as Mr. Clarke's case demonstrates, no proper interpretation of section 2T1.1 should permit a sentencing court to flatly disregard a straightforward adjustment in a defendant's favor when *the government* elects to make a "more accurate determination" of the defendant's tax rate. At a minimum, having accepted the government's approach, the District Court should afford an opportunity to the defendant to present evidence that would more precisely calculate the government's actual tax loss. Such an approach need not impose any undue burden on the court. Here, for example, Mr. Clarke did not present complex or speculative deductions, nor did he ask the court to search for potential adjustments. Rather, Mr. Clarke simply pointed to the undisputed facts that he was married and he was entitled to file a tax return jointly with his wife, and that doing so would have reduced his tax liability and provided a more accurate determination of what the government would have lost had his offense been successfully completed. The District Court could have accounted for Mr. Clarke's offset without triggering the concerns of undue burden expressed by other courts.

E. This Case Squarely Presents the Question

The case law on both sides of the Question Presented is well-developed. While Mr. Clarke submits that the reasoning of controlling decisions from the Fourth, Fifth, and Seventh Circuits is not persuasive, this Court will have the benefit of a well-developed body of law on this issue.

The instant case offers this Court a strong vehicle by which to resolve the Question Presented. It is undisputed that Mr. Clarke was married and was entitled to file a joint tax return with his wife. See Pet. App. 6a-7a, 9a-10a. Mr. Clarke has carefully presented the issue throughout the proceeding. The record shows how much a change in filing status would have reduced the amount of taxes he owed to the government and hence, precisely how it would have affected his base offense level under the Guidelines. *Id.* at 9a-10a.

That the Sentencing Commission has failed to address this issue despite two petitions for certiorari that presented the circuit split further militates in favor of this Court granting review. In opposing the petitions for certiorari on this issue in *Delfino* and *Phelps* the Solicitor General argued that the Commission should be allowed to resolve the split. Brief of the United States in Opposition to Petition for Writ of Certiorari, *Phelps* v. *United States*, No. 06-1667 (S. Ct. Sept. 14, 2007), 2007 WL 2734389; Brief of the United States in Opposition to Petition for Writ of Certiorari, *Delfino* v. *United States*, No. 07-1273 (S. Ct. Jun. 26, 2007), 2008 WL 2555339. But the Commission has not revised the provision, despite ongoing litigation since at least 1997, a clear circuit split since at least 2002, and two petitions for certiorari indicating that the issue is of great importance to criminal tax defendants.

While the Commission has the capacity to resolve conflicts arising from its own Guidelines, this Court need not wait indefinitely for that body to act. The Court ought not to wait here, both because the Commission has shown no indication that it will act soon, and because there is no assurance that a possible future change would provide clarity. The differing interpretations of section 2T1.1 (in both its prior and current versions) affect the fundamental liberty interests that are implicated by the length of a sentence. This Court should grant the petition and provide clarity where confusion and division have reigned for far too long.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 26, 2009

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed MAR 20, 2009]

No. 08-10038

D.C. Docket No. 07-00126-CR-IPJ-PWG

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GREGORY LOUIS CLARKE,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(March 20, 2009)

Before BIRCH and PRYOR, Circuit Judges, and STROM,* District Judge.

BIRCH, Circuit Judge:

Defendant-appellant Gregory Louis Clarke ("Clarke") appeals his convictions and sentences on three counts of tax fraud in violation of 26 U.S.C. § 7206(1). On appeal, Clarke argues that: (1) the district court

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* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

violated his Sixth Amendment right to a jury drawn from a fair cross-section of the community when it denied his motion to strike the jury venire based upon its racial make-up; (2) the evidence was insufficient to support the guilty verdict; and (3) the district court erred in calculating the tax loss amount and in applying the "sophisticated means" enhancement under the United States Sentencing Guidelines (the "guidelines"). After review of the record and consideration of the parties' briefs and oral arguments, we AFFIRM.

I. BACKGROUND

Clarke has been pastor of New Hope Baptist Church ("the church") and Superintendent of New Hope Christian School ("the school") in Birmingham, Alabama, since 1986. Clarke also served as interim manager of the New Hope Federal Credit Union ("the credit union") in 2001. Clarke received separate compensation, all paid by the church, for the services he rendered in each of these capacities. Clarke also received a $36,000 per year non-taxable minister's housing allowance, which was deposited into an account held by the church at Colonial Bank.

In January 2004, John Quartapella, an agent with the IRS's Criminal Investigation Division, began investigating Clarke after receiving an anonymous letter. As part of his investigation, Quartapella traced payments made by the church and the school to various sources on Clarke's behalf or for Clarke's benefit between 2000 and 2002 and determined that Clarke failed to report income of $11,205.94, $28,715.15, and $70,450.01 on his 2000, 2001, and 2002 tax returns, respectively.[2] A federal grand jury

[2] William Coker, an IRS auditer who analyzed the information gathered by Quartapella, confirmed these figures.

subsequently returned a three-count indictment charging Clarke with willfully filing false tax returns for tax years 2000 (Count One), 2001 (Count Two), and 2002 (Count Three), all in violation of 26 U.S.C. § 7206(1).

Before a jury was selected for Clarke's trial, Clarke moved to exclude the jury venire on the grounds that only three of its thirty-eight members were African-Americans. The courtroom deputy informed the district judge that the venire "wasn't specially drawn" and had been called in for both Clarke's trial and another criminal case. The district court denied the motion, noting that the venire was "just a regular jury pool" that was "from the southern division" of the district.

At trial, Lily Walton, Sandra Edwards, and Charles Trull, the individuals who prepared Clarke's 2000, 2001, and 2002 tax returns, respectively, testified that Clarke's returns were based solely on the W-2's and 1099's Clarke presented to them and that Clarke did not declare any additional income from other sources. At no time was Clarke advised that he was not required to report income not reflected on his W-2's or 1099's. Clarke reviewed the returns before they were filed with the Internal Revenue Service ("IRS") and never indicated that they were inaccurate or that they otherwise misstated his tax liability.

Quartapella testified that in 2000, the school paid Clarke's disability insurance premiums on his behalf directly to Franklin Life Insurance Company and also made monthly payments on a loan Clarke had taken out in 1999 to purchase a Hyundai Tiburon for his daughter. Several other witnesses testified that in 2000 they had paid Clarke fees for speaking engagements; "bird-dog" fees for referring customers to a local car dealership; referral fees for sending loans to

a mortgage company; and a $6600 "finder's fee" from Cameron Homes for bringing in investors to fund a real estate development project. Clarke did not report any of this income on his 2000 tax return.

With respect to 2001, Quartapella testified that the church paid Clarke's life insurance premiums, totaling over $6000, and that the school continued to pay Clarke's disability insurance premiums and the monthly payments on Clarke's daughter's car loan. In addition to these benefits, the church paid Clarke a salary of $750 every two weeks ($15,000 per year) for serving as interim manager of the credit union.[3] Mark Nixon, the church's Chief Financial Officer since 2001, testified that these $750 biweekly checks, which were drawn from the church's operating account, were deposited directly into Clarke's housing-allowance account and thus were not routed through the payroll system. According to Nixon, only he and the chairperson of the church's board of trustees had the authority to write checks out of the housing-allowance account.

With respect to 2002, Quartapella's investigation revealed that the school, in addition to paying Clarke's disability insurance premiums and car loan payments, made various other miscellaneous payments on Clarke's behalf, including $177.89 on a time-share property Clarke owned; $45 for Clarke's water bill; and $708 on Clarke's homeowner's insurance policy.[4] In total, Clarke received $10,308.21 in unreported income from the school in 2002.

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[3] Clarke also received fees for speaking engagements and a $100 "bird-dog" fee from Edwards Chevrolet.

[4] The $45 water bill and $708 homeowner's insurance premium payment were charged against Clarke as unreported income

Most significantly, however, Clarke received $60,000 from the church for his work at its South Avondale location. According to the 2002 budget for South Avondale, the $60,000 was designated for "pastor's housing expenses" and listed under the heading "salaries." R5 at 637. Nixon testified that the church did not give this money directly to Clarke, but deposited it into the church's savings account at the credit union. Clarke brought Nixon his bills as they became due and Nixon paid them at Clarke's direction until the amounts disbursed totaled $60,000. Out of this $60,000, Nixon paid off Clarke's personal credit card debt and the loan on the Tiburon and also wrote checks to cover Clarke's cosmetic dentistry and repairs to Clarke's home, including repainting and gutter work. Quartapella testified that although the total amount paid out on Clarke's behalf was less than $60,000, the remaining money was transferred into Clarke's housing allowance account. None of the checks written out of the church's accounts for Clarke's benefit in 2001 or 2002 were paid directly to Clarke.

Quartapella further testified that despite what Clarke had reported on his tax returns, Clarke had full knowledge of the extent of his income. Records Quartapella had subpoenaed during his investigation showed that Clarke had disclosed an annual income of $113,000 on the credit application he completed in order to obtain financing for his Lexus RX300, and had disclosed an annual income of $115,000 both on an application for a platinum MasterCard and on an application to amend his life insurance policy. Moreover, from 2000 to 2002, Clarke owned an interest in two time-shares, paid for expensive cosmetic

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because the school made these payments over and above the $36,000 housing allowance.

dental work, and purchased numerous luxury items, including a 2.73-carat diamond ring, a projection television, a camcorder, a DVD player, and custom-made clothes. According to Quartapella, the excessiveness of Clarke's lifestyle relative to his reported income was indicative of fraud.

At the conclusion of the government's case-in-chief, Clarke moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a), arguing that the government failed to prove all the elements of the crimes charged. The district court denied the motion. Clarke then presented several witnesses who testified that the $60,000 payment from the church was a "gift" and not compensation for services rendered. These witnesses conceded, however, that there was no written evidence, either in the minutes from the meeting in which the 2002 budget was discussed or in the budget itself, that the $60,000 payment was intended as a gift. They further conceded that this amount was identified in the 2002 budget for "Pastor housing expenses," and was listed under the heading "salary." *Id.* at 714. Clarke renewed his motion for a judgment of acquittal at the close of all the evidence, and it was again denied. The jury subsequently convicted Clarke on all three counts of the indictment.

The court set a sentencing hearing and ordered a presentence investigation report ("PSI"). The PSI recommended a base offense level of 14, based on a tax loss of $35,684, and applied a two-level enhancement under U.S.S.G. § 2T1.1(b)(2) after finding that Clarke used sophisticated means to conceal his fraud from the IRS. At sentencing, Clarke objected to the tax loss amount, arguing that it should be calculated as if he had legally amended his tax return to reflect a filing status of married, filing jointly. He also argued

that his was a "routine tax case" and that the "sophisticated means" enhancement was therefore inappropriate. R7 at 13. The district court overruled Clarke's objections, adopted the PSI, and sentenced Clarke to twenty-one months' imprisonment. Clarke now appeals both his convictions and sentences.

II. DISCUSSION

On appeal, Clarke argues that: (1) the district court's denial of his motion to strike the jury venire, on the grounds that only three of its thirty-eight members were African-American, violated his Sixth Amendment right to a jury selected from a fair cross-section of the community; (2) the evidence was insufficient to establish guilt beyond a reasonable doubt; and (3) the district court erred in determining the tax loss amount and in finding that he used sophisticated means to conceal the fraud. We address each argument in turn.

A. Motion to Strike Jury Venire

"The Sixth Amendment guarantees a criminal defendant the right to be indicted and tried by juries drawn from a fair cross-section of the community." *United States v. Grisham*, 63 F.3d 1074, 1078 (11th Cir. 1995). A defendant establishes a *prima facie* violation of the fair-cross-section requirement by showing that: (1) the allegedly excluded group is a "'distinctive' group in the community"; (2) the representation of this group in the venire from which the jury was selected was not "fair and reasonable in relation to the number of such persons in the community"; and (3) the under-representation was due to "systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979).

Clarke contends that while African-Americans made up just under eight percent of the jury panel, the 2000 census as reported by the University of Alabama showed that African-Americans represented approximately twenty-one percent of the population of the Northern District of Alabama. *See* Appellant's Brief at 22. While we have held that the second element is not satisfied where the absolute disparity between the percentage of the distinctive group among the population eligible for jury service and the percentage of the distinctive group on the jury panel is ten percent or less, *see Grisham*, 63 F.3d at 1074, Clarke's challenge to the jury selection process is nevertheless unavailing because he has presented no evidence showing that the under-representation in this case was due to systematic exclusion of African-Americans. Accordingly, Clarke has failed to establish that the jury selection process violated the Sixth Amendment. *See Unite States v. Pepe*, 747 F.2d 632, 649 (11th Cir. 1984) (failure to establish any elemen of *prima facie* case is fatal to Sixth Amendment challenge to jury selection process).

B. Sufficiency of the Evidence

We review *de novo* the sufficiency of the evidence in a criminal trial, viewing the evidence in the light most favorable to the government, and must uphold a conviction "unless the jury could not have found the defendant guilty under any reasonable construction of the evidence." *United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999). In evaluating the evidence, all reasonable inferences and credibility choices are made in support of the verdict. *See United States v. Mieres-Borges*, 919 F.2d 652, 656 (11th Cir. 1990).

To sustain a conviction under 26 U.S.C. § 7206(1), the government must prove that: (1) the defendant willfully made and subscribed to a tax return; (2) the return contained a written declaration that it was made under penalties of perjury; (3) the defendant did not believe that the return was true as to every material matter; and (4) the return was false as to a material matter. *See* 26 U.S.C. § 7206(1).

Clarke does not dispute that he received over $110,000 from the church, school, and other sources during the three-year period from 2000 to 2002, but asserts that his failure to report this income on his tax returns was not willful. Clarke's argument is without merit. The government presented ample evidence that Clarke knew his income exceeded the amounts he reported on his tax returns and that he had the opportunity to review and correct his returns before filing them with the IRS. Viewing the evidence in the light most favorable to the government, we have no difficulty finding that it was sufficient for a reasonable jury to conclude beyond a reasonable doubt that Clarke willfully filed tax returns in which he knowingly and significantly under-reported his income for tax years 2000, 2001, and 2002, and that he was aware of their falsity when he signed and subscribed them under penalties of perjury.

C. Clarke's Sentence

1. Tax Loss Amount

Clarke argues that the court should have calculated the tax loss based not upon his tax liability under the original return, which he filed as married, filing separately, but upon what his tax liability would have been had he amended his return to reflect a filing status of married, filing jointly. He asserts that if he

had filed as the latter, the loss would have been reduced from $35,811 to $28,186, resulting in a base offense level of 12 rather than 14. *See* U.S.S.G. § 2T4.1. The government responds that the tax loss was correctly based on the original returns because the "tax loss" is the loss the defendant intends when he files the fraudulent return. Because this claim involves an interpretation of the sentencing guidelines, our review is *de novo*. *United States v. Hunerlach*, 197 F.3d 1059, 1069 (11th Cir. 1999) (reviewing *de novo* district court's inclusion of interest and penalties in tax loss calculation under U.S.S.G. § 2T1.1).

The guidelines provide that where, as here, the offense involved the filing of a fraudulent or false tax return, "the tax loss is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." U.S.S.G. § 2T1.1(c)(1). Although we have not decided the issue of whether a defendant's unclaimed deductions or losses may be taken into account in determining tax loss for purposes of § 2T 1.1(c)(1), several other circuits have taken the government's position and have held that the "tax loss" is the amount of loss the defendant intends to bring about, not the amount of loss to the government that actually results, and therefore, unclaimed deductions or other reductions in tax liability that are unrelated to the offense of conviction may not be used to offset the tax loss amount. *See United States v. Blevins*, 542 F.3d 1200, 1203 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1024 (2009); *accord United States v. Delfino*, 510 F.3d 468, 472-73 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 41 (2008); *United States v. Phelps*, 478 F.3d 680, 682 (5th Cir.) (per curiam), *cert. denied*, 128 S. Ct. 436 (2007); *United States v. Chavin*, 316 F.3d 666, 677 (7th Cir. 2002); *United States v. Spencer*, 178 F.3d

1365, 1368 (10th Cir. 1999); *United States v. Tandon*, 111 F.3d 482, 490 (6th Cir. 1997); *United States v. Valentino*, 19 F.3d 463, 465 (9th Cir. 1994). *But see United States v. Gordon*, 291 F.3d 181, 188 (2d Cir. 2002) (holding that district court erred in refusing to consider potential unclaimed deductions in sentencing analysis).

We join the majority of the circuits that have addressed this issue and hold that "tax loss" under U.S.S.G. § 2T1.1(c)(1) is the amount of loss the defendant intends to create when he falsifies his tax return and must therefore be calculated based upon the fraudulent return. In this case, the object of Clarke's offense was the amount by which he underreported and fraudulently misstated his taxable income on his 2000, 2001, and 2002 returns. That his tax liability may have been lower had he filed as married, filing jointly rather than married, filing separately is thus irrelevant to the determination of the amount of loss to the government that he *intended* when he underreported his income. *See Chavin*, 316 F.3d at 677 ("[R]eference to other unrelated mistakes on the return such as unclaimed deductions tells us nothing about the amount of loss to the government that [defendant's] scheme intended to create."). Accordingly, the district court did not err in computing the tax loss based on the fraudulent return Clarke actually filed, and not on the tax return Clarke could have filed but did not.

2. "Sophisticated Means" Enhancement

Clarke also argues that the district court erred in applying the two-level "sophisticated means" enhancement under U.S.S.G. § 2T1.1(b)(2) because he never directed anyone to hide the payments that were made on his behalf and the existence of an audit trail belied any purposeful concealment. We review the district

court's findings of fact related to the imposition of sentencing enhancements, including a finding that the defendant used sophisticated means, for clear error. *United States v. Robertson*, 493 F.3d 1322, 1329-30 (11th Cir. 2007). Under this standard, we will not disturb a district court's findings "unless we are left with a definite and firm conviction that a mistake has been committed." *United States v. Crawford*, 407 F.3d 1174, 1177 (11th Cir. 2005) (quotation marks and citation omitted). Notwithstanding the deferential nature of our review, "we are not required to rubber stamp the district court's findings simply because they were entered." *Id.* (quotation marks and citation omitted).

The sentencing guidelines allow the district court to enhance a defendant's base offense level by two levels if the offense involved "sophisticated means." U.S.S.G. § 2T1.1(b)(2). The commentary describes "sophisticated means" as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense," including "[c]onduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts." *Id.* § 2T 1.1(b), comment. (n.4). Although the mere failure to report income to an accountant does not involve sophisticated means, *see United States v. Barakat*, 130 F.3d 1448, 1457 (11th Cir. 1997), a defendant need not use offshore bank accounts or transactions through fictitious entities in order for the enhancement to apply, *see United States v. Campbell*, 491 F.3d 1306, 1315-16. (11th Cir. 2007).

In *Barakat*, we concluded that where the defendant had a mortgage company for whom he performed consulting work deposit his $15,000 fee into an attor-

ney's trust account, the district court did not clearly err in finding that the defendant had used "sophisticated means" to conceal his tax evasion. Because the fee was routed through the trust account, "[the defendant] could fail to disclose the . . . payment[] knowing that, in the absence of a Form 1099, it was unlikely the IRS would ever become aware of that income." *Barakat*, 130 F.3d at 1457.[5] In *Campbell*, we held that the district court's application of the sophisticated means enhancement was not clear error where the defendant was found to have utilized campaign accounts and credit cards issued to other people to conceal cash expenditures. *See* 491 F.3d at 1315. In so holding, we noted that "Campbell's deceptive practices were at least as sophisticated as the practice at issue in *Barakat*," and that, in terms of the degree of sophistication, hiding assets or transactions through the use of a campaign fund was no different than hiding assets or transactions through the use of fictitious entities, corporate shells, or offshore financial accounts. *Id.*

As in *Barakat* and *Campbell*, we are not in this case left with a definite and firm conviction that the district court erred in finding that Clarke used sophisticated means to hide his tax evasion scheme. The record reflects that Clarke concealed the true extent of his income by: (1) depositing his salary from

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[5] In *Barakat*, the defendant was convicted of and sentenced for both tax evasion and mail fraud. We found that application of the sophisticated means enhancement with respect to the tax evasion conviction, though a "close question," was not clear error, but remanded the case because it would have been clear error had the district court found that the defendant used sophisticated means to conceal his mail fraud conspiracy and it was not clear from the record with respect to which conviction the enhancement was applied. *See* 130 F.3d at 1457-58.

the church and the credit union into accounts that were not registered in his own name; (2) instructing the church to make payments out of these accounts directly to his personal creditors; and (3) having the school and the church pay his life and disability insurance premiums directly to the insurance carriers. For purposes of the sophisticated means enhancement, we see no material difference between concealing income and transactions through the use of third-party accounts, as was the case here, and using a corporate shell or a fictitious entity to hide assets. See U.S.S.G. § 2T1.1, comment. (n.4); *see Campbell*, 491 F.3d at 1315-16. The district court did not clearly err in finding that Clarke's activity, which covered a three-year period and required intricate planning, involved the use of sophisticated means.

III. CONCLUSION

Clarke appeals his convictions and sentences for tax fraud. We conclude that: (1) the district court properly denied Clarke's motion to exclude the jury venire; (2) there was sufficient evidence from which a reasonable jury could have found Clarke guilty of the charged offenses; and (3) the district court correctly calculated the applicable guidelines range. Accordingly, Clarke's convictions and sentences are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of Alabama

Case Number CR 07-J-126-S

UNITED STATES OF AMERICA

v.

GREGORY LOUIS CLARKE
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After
November 1, 1987)

The defendant, GREGORY LOUIS CLARKE, was represented by Mark E. Hoffman and Samuel R. McCord.

The defendant was found guilty on count(s) 1, 2, and 3 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Count Number(s)
26 U.S.C. § 7206 (1)	Filing of False Tax Returns Under Penalty of Perjury	1-3

As pronounced on December 18, 2007, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $300.00, for count(s) 1, 2, and 3, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 19th day of December, 2007

/s/ INGE PRYTZ JOHNSON
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 21 as to Counts One, Two, and Three to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

(1) That the defendant be placed in a minium security facility.

The defendant shall report to the designated facility on Friday, February 15, 2008 at 9:00, if there is not a designated facility the defendant shall report on the same date and time to the U.S. Marshal's Office..

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 12 months. The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime; specifically, the defendant shall not illegally possess a controlled substance and shall not own or possess a firearm or destructive device.

2) The defendant shall not leave the judicial district without permission of the Court or probation officer.

3) The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month.

4) The defendant shall answer truthfully all inquiries by the probation officer, shall provide the probation officer access to requested financial information, and shall follow the instructions of the probation officer.

5) The defendant shall support his or her dependents and meet other family responsibilities.

6) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

7) The defendant shall notify the probation officer ten (10) days prior to any change in residence or employment. (On change of residence to a new jurisdiction of a person convicted either of a crime of violence or of a drug trafficking offense, the Probation Office is responsible for complying with the notice provisions of 18 U.S.C. § 4042(b).)

8) The defendant shall refrain from excessive use of alcohol, except that a defendant while in the Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) (or comparable program in another district) shall consume no alcohol. The defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

12) The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

14) The defendant shall comply with any directions from the probation officer to serve notice of third party risks the defendant may pose, and shall cooperate with the officer's efforts to confirm compliance.

15) The defendant shall comply with the probation office's Policies and Procedures Concerning Court Ordered Financial Obligations to satisfy the balance of any monetary obligation resulting from the sentence imposed in the case. Further, the defendant shall notify the probation office of any change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine, restitution, or assessment fee. If the defendant becomes more than 60 days delinquent in payments of financial obligations, the defendant may be (a) required to attend a financial education or employment preparation program under the

administrative supervision the probation officer, (b) placed on home confinement subject to electronic monitoring for a maximum period of 90 days under the administrative supervision of the probation officer (with the defendant to pay the cost of monitoring unless the probation officer determines that the defendant does not have the ability to do so), and/or (c) placed in a community corrections center for up to 180 days under the administrative supervision of the probation officer (with the defendant to pay the cost of subsistence unless the probation officer determines that the defendant does not have the ability to do so).

16) Unless excused by a special condition of probation or supervised release in the Judgment or by a subsequent court order, the defendant shall comply with 18 U.S.C. § 3563 (a) (probation) or § 3583 (d) (supervised release) regarding mandatory drug testing (with the defendant to contribute to the cost of drug testing unless the probation officer determines that the defendant does not have the ability to do so). A positive urinalysis may result in the defendant's placement in the probation office's Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) (or comparable program in another district) under the administrative supervision of the probation officer.

17) Upon imposition of the special condition by the Court or upon a court order entered during the period of probation or supervision for good cause shown, the defendant shall be placed in the Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) (or comparable program in another district) based upon a history of

drug or alcohol abuse, a positive urinalysis, or evidence of excessive use of alcohol. This program includes (a) testing by the probation officer or an approved vendor to detect drug or alcohol abuse; (b) a drug treatment program which includes education, individual or group counseling, or residential treatment, provided by the probation office or an approved vendor; (c) placement in a community corrections center (halfway house) for up to 270 days; and/or (d) home confinement subject to electronic monitoring for up to 180 days. Participation in the program shall be under the administrative supervision of the probation officer, and the defendant shall contribute to the costs of participation unless the probation officer determines that the defendant does not have the ability to do so.

18) The defendant may be placed in the probation office's computer restriction/monitoring program (or comparable program in another district) by virtue of a special condition of probation or supervised release contained in the Judgment. This program may include the following: (a) The defendant shall not possess or use any computer or portable electronic device which has the capability of communicating with any other electronic device without the prior approval of the probation officer or the Court. This includes, but is not limited to, any computer, personal digital assistant, satellite equipment, cellular telephone, or services such as computer on-line bulletin board services and/or internet service. The defendant shall notify the probation officer before altering or effecting repairs to any computer he uses. (b) The defendant shall permit the probation officer to conduct periodic, unannounced examinations

of any computer and computer-related equipment the defendant uses, other than equipment owned by his/her employer that is maintained at a place of employment other than the defendant's home. The examination may include the retrieval and copying of all data from the computer, and internal or external peripheral equipment, and any software. (c) The defendant, under the administrative supervision of the probation officer, shall allow, at his expense, the installation of any hardware/software on any computer system he uses, other than equipment owned by his employer, to monitor his/her computer use (and/or to prevent access to prohibited materials), and he/she shall submit to such monitoring. The defendant shall consent to the placement of a notice on any computer upon which monitoring hardware/software is installed to warn others of the existence of the monitoring. (d) The defendant shall not use any computer or computer-related equipment owned by his/her employer except for strict benefit of his employer in the performance of his/her job-related duties. (e) The defendant shall consent to third-party disclosure to any employer or potential employer of any computer-related restrictions which have been imposed upon him/her. (f) The defendant shall provide the U.S. Probation Office with accurate information about all hardware and software which comprise any computer system he/she uses; all passwords used by the defendant, and information pertaining to all internet service providers used by the defendant, whether specifically subscribed by the defendant or not. The defendant shall provide written authorization for release of information from the defendant's inter-

net service provider. (g) The defendant shall furnish his/her personal and business telephone records to the probation officer upon request. Furthermore, the defendant shall provide the probation officer with written authorization for release of information from the defendant's telephone service provider. (h) The defendant shall not possess or use any type of data encryption or stenography software or technique. The defendant shall not alter, delete, or hide records pertaining to computer access, retrieval, or storage.

19) The defendant shall cooperate in the collection of DNA under the administrative supervision of the probation officer.

20) If ordered to a period of supervised release after incarceration, the defendant shall report in person, within 72 hours of release from the custody of the Bureau of Prisons, to the probation office in the district where the defendant is released.

21) For a defendant convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall attend a public, private, or private non-profit offender rehabilitation program approved by the court and under the administrative supervision of the probation office, if an approved program is available within a 50-mile radius of the defendant's legal residence.

22) For any defendant required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the terms of the Act under the administrative supervision of the probation officer. Specifically, the defendant, if convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address

where the defendant will reside and any subsequent change of residence to the probation office, and shall register as a sex offender in any State where the defendant resides, is employed, carries on a vocation, or is a student.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The mandatory drug testing provisions of 18 U.S.C. § 3563(a) are waived upon the court's finding that the offense of conviction is not drug-related, there is no current or past history of substance abuse, and there is a low risk of future substance abuse by the defendant.

2) Because he is currently receiving treatment and is taking medication for depression, the defendant shall participate, under the administrative supervision of the probation officer, in mental health rehabilitation programs. The defendant shall contribute to the cost of mental health treatment unless the probation officer determines that the defendant does not have the ability to do so.

3) The defendant shall cooperate with the Internal Revenue Service to pay all outstanding taxes, interests, and penalties.

RESTITUTION AND FORFEITURE

RESTITUTION

The court, pursuant to the Victim and Witness Restitution Act, finds that the following is a victim of defendant's criminal conduct and has sustained loss in the indicated amounts and orders restitution by the defendant as follows:

Name & address of payee(s)	Amount
Internal Revenue Service ATTN: MPU, STOP 151 (restitution) P.O. Box 47-421 Doraville, GA 30362 RE: Gregory Louis Clarke, 2:07-CR-IPJ-PWG	$35,684.00

Payments of restitution without interest are to be made to Clerk, U. S. District Court, for transfer to the payee(s).

The defendant shall make payments in accordance with the payment schedule previously adopted by this court and administered by the probation office until he surrenders for his sentence of imprisonment. During his incarceration he shall make payments of $25.00 per month. Upon his release from imprisonment, any remaining balance shall be paid in monthly payments during the period of supervision in accordance with the financial guidelines previously approved by the court for use in this district and administered by the probation office.

If there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
[Filed May 27, 2009]

No. 08-10038-EE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
GREGORY LOUIS CLARKE,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: BIRCH and PRYOR, Circuit Judges, and STROM,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

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* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

APPENDIX D

UNITED STATES CODE ANNOTATED
Federal Sentencing Guidelines

Chapter Two. Offense Conduct
Part T. Offenses Involving Taxation
1. Income Taxes, Employment Taxes,
Estate Taxes, Gift Taxes, and Excise Taxes
(Other Than Alcohol, Tobacco, and Customs Taxes)

§ 2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

(a) Base Offense Level:

(1) Level from § 2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 6, if there is no tax loss.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(2) If the offense involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(c) Special Instructions

For the purposes of this guideline—

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(D) If the offense involved (i) conduct described in subdivision (A), (B), or (C) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

(2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Notes: (A) If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved (i) conduct described in subdivision (A) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

(3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.

(4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.

(5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

[Commentary to Guideline is located in Historical Note field. The following credit reflects amendments to both Guideline and Commentary.]

CREDIT(S)

(Effective November 1, 1987, and amended effective November 1, 1989; November 1, 1990; November 1, 1992; November 1, 1993; November 1, 1998; November 1, 2001; November 1, 2002.)

COMMENTARY

Statutory Provisions: *26 U.S.C. §§ 7201, 7203 (other than a violation based upon 26 U.S.C. § 6050I), 7206 (other than a violation based upon*

26 U.S.C. § 6050I or § 7206(2)), and 7207. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Tax loss" is defined in subsection (c). The tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. 7201 and willful failure to pay cases under 26 U.S.C. 7203. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

Notes under subsections (c)(1) and (c)(2) address certain situations in income tax cases in which the tax loss may not be reasonably ascertainable. In these situations, the "presumptions" set forth are to be used unless the government or defense provides sufficient information for a more accurate assessment of the tax loss. In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

Example 1: A defendant files a tax return reporting income of $40,000 when his income was actually $90,000. Under Note (A) to subsection (c)(1), the tax loss is treated as $14,000 ($90,000 of actual gross income minus $40,000 of reported gross income = $50,000 x 28%) unless

sufficient information is available to make a more accurate assessment of the tax loss.

Example 2: A defendant files a tax return reporting income of $60,000 when his income was actually $130,000. In addition, the defendant claims $10,000 in false tax credits. Under Note (A) to subsection (c)(1), the tax loss is treated as $29,600 ($130,000 of actual gross income minus $60,000 of reported gross income = $70,000 x 28% = $19,600, plus $10,000 of false tax credits) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 3: A defendant fails to file a tax return for a year in which his salary was $24,000, and $2,600 in income tax was withheld by his employer. Under the note to subsection (c)(2), the tax loss is treated as $2,200 ($24,000 of gross income x 20% = $4,800, minus $2,600 of tax withheld) unless sufficient information is available to make a more accurate assessment of the tax loss.

In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

2. In determining the total tax loss attributable to the offense (see § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) there is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using offshore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.

3. "Criminal activity" means any conduct constituting a criminal offense under federal, state, local, or foreign law.

4. Sophisticated Means Enhancement.—For purposes of subsection (b)(2), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

5. A "credit claimed against tax" is an item that reduces the amount of tax directly, in contrast, a "deduction" is an item that reduces the amount of taxable income.

6. "Gross income," for the purposes of this section, has the same meaning as it has in 26 U.S.C. § 61 and 26 CFR § 1.61.

7. If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on both the defendant's individual tax return and the defendant's corporate tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate assessment of that tax rate. For example, the defendant, the sole owner of a Subchapter C corporation, fraudulently understates the corporation's income in the amount of $100,000 on the corporation's tax return, diverts the funds to the defendant's own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to the defendant's corporate tax return is $34,000 ($100,000

multiplied by 34%). The tax loss attributable to the defendant's individual tax return is $28,000 ($100,000 multiplied by 28%). The tax loss for the offenses are added together to equal $62,000 ($34,000 + $28,000).

Background: This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately $90 billion annually. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than $100,000 in tax loss.

The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally derived income is included as a factor for deterrence purposes. Criminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2).

Although tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes.

The guideline does not make a distinction for an employee who prepares fraudulent returns on behalf of his employer. The adjustments in Chapter Three, Part B (Role in the Offense) should be used to make appropriate distinctions.